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SUPREME COURT, U. S.

71-615

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term 1971
No. .....

LIBRARY
SUPREME COURT, U. S.

PAUL CHAPMAN,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Petition for a Writ of Certiorari to the Court of Appeal of the State of California in and for the First Appellate District, Division Two.

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Petition for a Writ of Certiorari to the Court of Appeal of the State of California in and for the First Appellate District, Division Two.

Petitioner, Paul Chapman, prays that a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeal for the State of California in and for the First Appellate District, Division Two, entered in the above entitled case on May 26, 1971.

Opinions Below.

The opinion of the Court of Appeal of the State of California in and for the First Appellate District, Division Two, is reported in 17 Cal.App.3d 865, 95 Cal.Rptr. 242. A copy of the opinion appears in Appendix A hereto. The opinion of the Superior Court of the State of California in and for the County of Alameda, Appellate Department, is not reported. A copy of the opinion appears in Appendix B hereto. The opinion of the trial court was delivered orally and

is not reported. A copy of the ruling, which appears in the Reporter's Transcript on Appeal to the Superior Court of the State of California in and for the County of Alameda, Appellate Department, appears in pertinent part in Appendix C hereto. No written opinion was rendered by the Supreme Court of the State of California denying a petition for hearing.

Jurisdiction.

The judgment of the Court of Appeal of the State of California in and for the First Appellate District, Division Two (Appendix A) was entered on May 26, 1971. A due and timely petition for hearing by the California Supreme Court, after decision by the said Court of Appeal, was denied on August 13, 1971. A copy of the order denying the petition for hearing by the California Supreme Court appears in Appendix D hereto. The judgment of the Court of Appeal, as aforestated, is a final judgment and jurisdiction is invoked under 28 U.S.C. §1257(3).[1]

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[1]Under California law, Penal Code §1538.5, the right of a defendant in a criminal prosecution to make a motion for the return of property or to suppress as evidence any material obtained as a result of a search or seizure is limited to a special hearing prior to trial. If the property or evidence relates to a misdemeanor complaint, the motion must be made in a municipal court before trial and heard prior to trial at a special hearing relative to the validity of the search or seizure. §1538.5(g). If the defendant makes a motion for the return of property or the suppression of evidence in the municipal court, both the People and the defendant have the right to appeal any decision of that court relating to that motion to the Superior Court of the county in which such inferior court is located. §1538.5(j). The proceedings provided for in §1538.5 constitute the sole and exclusive remedy to test the unreasonableness of a search or seizure. The final determination on appeal under §1538.5 of the validity of a search and seizure is conclusive in any subsequent proceedings. The trial court has no jurisdiction to entertain any renewed motion to suppress. See, *People v. Superior Court*, 4 Cal.3d

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Questions Presented.

1. Whether the provisions of the California statutory search and seizure procedures (Penal Code §§1523-1540), and particularly §1538.5, on their face and as construed and applied to authorize the seizure and suppression of books and magazines, without a prior adversary hearing in a judicial proceeding to determine the alleged obscenity of the material, constitute a prior restraint on the exercise of freedom of expression and violate the free speech and press, due process, equal protection, and search and seizure provisions of the First, Fourth and Fourteenth Amendments to the United States Constitution.

2. Whether the provisions of the California statutory search and seizure procedures (Penal Code §§1523-1540), and particularly §1538.5, on their face and as construed and applied to authorize the State to retain possession of books and magazines judicially determined to have been illegally seized, pending hearing to determine whether the material is obscene, violate the free speech and press, due process, equal protection, and search and seizure provisions of the First, Fourth and Fourteenth Amendments to the United States Constitution.

3. Whether the provisions of the California statutory search and seizure procedures (Penal Code §§1523-

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605, 483 P.2d 1202, 94 Cal.Rptr. 250 (1971). Thus, the issue of the validity of a search and seizure is no longer open as an issue after final disposition of the pre-trial remedies provided by §1538.5. The right of the defendant to a return of the property allegedly seized illegally is conclusively determined in the independent pre-trial proceedings under §1538.5. See, *Mills v. Alabama*, 384 U.S. 214, 217-218; *Camara v. Municipal Court*, 387 U.S. 523; *Johnson v. Muelberger*, 340 U.S. 581, 583. See also, *Marcus v. Search Warrants of Property*, 367 U.S. 717; *Quantity of Copies of Books v. Kansas*, 378 U.S. 205.

1540), and particularly §1538.5, on their face and as construed and applied to authorize the seizure and suppression of books and magazines, fail to provide the timely procedural safeguards enunciated by the Court in *Freedman v. Maryland*, 380 U.S. 51, and therefore violate the free speech and press, due process, equal protection, and search and seizure provisions of the First, Fourth, and Fourteenth Amendments to the United States Constitution.

4. Whether the provisions of the California statutory search and seizure procedures (Penal Code §§1523-1540), and particularly §1538.5, on their face and as construed and applied to authorize the seizure and suppression of books and magazines, solely on the basis of an *ex parte* showing of alleged "probable cause" in a conclusionary affidavit of a police officer, and a perusal by the magistrate prior to seizure of only 3 of the 35 titles seized, constitute a prior restraint on the exercise of freedom of expression and therefore violate the free speech and press, due process, equal protection, and search and seizure provisions of the First, Fourth and Fourteenth Amendments to the United States Constitution.

5. Whether the provisions of the California statutory search and seizure procedures (Penal Code §§1523-1540), and particularly §1538.5, and the provisions of the California obscenity statute (Penal Code §§311-312.5), on their face and as construed and applied to authorize the seizure and suppression of the books and magazines herein, are rendered vague, ambiguous, uncertain and overbroad, constituting a system of prior restraint and censorship and therefore violate the free speech and press, due process, equal protection,

and search and seizure provisions of the First, Fourth and Fourteenth Amendments to the United States Constitution.

Constitutional and Statutory Provisions Involved.

The pertinent provisions of the First, Fourth and Fourteenth Amendments to the Constitution of the United States and the provisions of California Penal Code §1538.5 appear in Appendix E hereto.

Statement.

A. On September 19 and 22, 1969, police officers purchased from petitioner four magazines entitled "His and Hers", "21", "Bizarre Life" and "Eve's Rib" and one paperback book entitled *The Unwilling Switchers* at the Readmore bookstore in Fremont, California [R.T. 12-18].[2] On the next day, September 23, 1969, one of the aforesaid police officers executed an affidavit in which he alleged that he had "just, probable and reasonable cause to believe" that petitioner had in his possession thirty different titles of magazines and paperback books which were allegedly obscene. It appears that at the time of the purchase of the aforesaid four magazines and one paperback book, the police officers had hurriedly leafed through other magazines and paperback books which were available for purchase [R.T. 79-80] and decided to include such material in the affidavit in support of the search warrant. On the same day, the affidavit was presented to a Judge of the Municipal Court. The record reveals that, together with the affidavit, the judge was shown no more than

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[2]The reference "R.T." is to the Reporter's Transcript on Appeal from the judgment of the Municipal Court to the Superior Court of the State of California in and for the County of Alameda, Appellate Department.

five of the publications [R.T. 93-94]. They appear to have included the four magazines which were initially purchased by the police officers.

The search warrant was issued by the Honorable Roy G. Pucci, a Judge of the Municipal Court for the Fremont-Newark-Union City Judicial District, County of Alameda, State of California, on September 23, 1969. The search warrant called for the seizure of six specified magazines. A copy of the search warrant appears in Appendix F hereto. No adversary proceeding was initiated prior to the issuance of the search warrant. This *ex parte* proceeding was then followed by a search and seizure at the bookstore on the same day, September 23, 1969. At that time, despite the limitations of the search warrant, the police officers seized up to six copies of some thirty-five separate titles of magazines and books [R.T. 7].

How Federal Questions Are Presented.

The petitioner moved for the restoration of the property seized under the search warrant, pursuant to California Penal Code §1538.5 and related state statutory search and seizure procedures. The grounds for the motion, among other things, were that the seizure of books and magazines at the bookstore was impermissible in the absence of a prior adversary hearing to determine the issue of obscenity; that the affidavit of the police officer in support of the search warrant failed to set forth reasonable or probable cause for the issuance of the search warrant; that the indiscriminate search and seizure of the publications at the bookstore was illegal because outside the scope of the warrant and merely exploratory and ransacking; and that the state statutory search and seizure procedures, on their

face and as construed and applied, violated the free speech and press, due process, and search and seizure provisions of the First, Fourth and Fourteenth Amendments to the United States Constitution. The motion of petitioner was in all respects denied. The sole exception was the following: "As to those books which were seized by the Police Department, which were not listed in the warrant, the Defendant's motion to suppress will be granted." [R.T. 207; Appendix C].

B. Petitioner duly prosecuted an appeal to the Superior Court of the State of California in and for the County of Alameda, Appellate Department. It was urged, among other things, that the seizure of the material without a prior adversary hearing to determine the alleged obscenity of the material violated the free speech and press, due process, and search and seizure provisions of the First, Fourth and Fourteenth Amendments. It was urged that reliance on the conclusionary allegations of the police officer's affidavit for the issuance of the search warrant was also constitutionally impermissible. Finally, a detailed attack was made on the state statutory search and seizure provisions of the California Penal Code, and particularly §1538.5, upon the grounds that the statutory search and seizure provisions violated the First, Fourth and Fourteenth Amendments to the Constitution.

The opinion and judgment of the aforesaid Appellate Department resulted in a reversal in part and an affirmance in part of the judgment of the Municipal Court (Appendix B). With respect to the issue of search and seizure, the Appellate Department noted the decisions of the courts with respect to the protection of magazines, books and films against mass

seizure. "Such a seizure often results in irreparable damage to the possessor, distributor or exhibitor of the alleged obscene material without prior adversary hearing to enable fair evaluation of the legal rights involved." The court cited *Quantity of Copies of Books v. Kansas*, 378 U.S. 205; *Bethview Amusement Corp. v. Cahn*, 416 F.2d 410 (2 Cir. 1969); and *Tyrone, Inc. v. Wilkinson*, 410 F.2d 639 (4 Cir. 1969). The court concluded that with respect to books and magazines which were openly available for public sale to adults in a retail establishment ostensibly operated by petitioner, a seizure was constitutionally impermissible in the absence of a prior adversary proceeding. The court therefore reversed the order of the Municipal Court denying petitioner's motion for the return and suppression as evidence of the publications which had been seized pursuant to the search warrant. The order was affirmed only as to the five publications which had been acquired by the police officers through purchase.

The opinion and judgment of the Appellate Department was rendered on July 15, 1970. On the same day the court transferred and certified the case to the Court of Appeal of the State of California under Rule 63 of the California Rules of Court in order "to settle important questions of law". The Appellate Department noted that while it had affirmed the order of the Municipal Court as to books and magazines which had been purchased by the police officers, it had nevertheless reversed the judgment insofar as publications had been seized under a search warrant issued without a prior adversary proceeding. The court stated, "A number of Federal Court decisions on the same subject have invalidated seizures made on ex parte warrants thus creating some conflict between State and Federal

Court rulings on the subject". A copy of the certification appears in Appendix G hereto.

C. On August 19, 1970, the Court of Appeal of the State of California in and for the First Appellate District, Division Two, in accordance with the California Rules of Court, transferred the appeal pending in the Appellate Department, as aforestated, from that court to the said Court of Appeal and directed that the case be heard when ordered on calendar by the court. After due hearing and argument, the Court of Appeal rendered its opinion and judgment on May 26, 1971 (Appendix A). With respect to the requirement of a prior adversary hearing, the Court of Appeal held that the Appellate Department was in error; that under the decisions of the California Supreme Court in *People v. Luros*, 4 Cal.3d 84, 92 Cal.Rptr. 833; *Aday v. Superior Court*, 55 Cal.2d 789, 13 Cal.Rptr. 415; and *People v. Aday*, 226 Cal.App.2d 520, an *ex parte* determination of probable cause to believe that the material involved is obscene was sufficient to authorize a magistrate to issue a search warrant. The court indicated that the constitutional requirements would be met if a proprietor of a bookstore assumed the burden, after seizure, of initiating proceedings under the state statutory search and seizure procedures, and if unsuccessful there, by pursuing remedies of mandamus or appeal under §1538.5. The Court of Appeal noted that there had been "a number of opinions entered by the federal district courts of California" requiring magistrates to conduct prior adversary hearings before issuing a search warrant, but noted that the Supreme Court had vacated the affirmance of these rulings by the Court of Appeals for the Ninth Circuit in *Demich, Inc. v. Ferdon*, 426 F.2d 643 (9 Cir. 1970),

vacated and remanded, 401 U.S. 990. Moreover, even with respect to so much of the order of the Municipal Court which had directed the return of the seized material which had not been named in the search warrant, the Court of Appeal vacated the order of the Municipal Court.

In short, the ruling of the Court of Appeal was that in California, under the state statutory search and seizure procedures, and particularly §1538.5, no adversary hearing before a judicial officer was required to determine the alleged obscenity of material prior to the issuance of a search warrant and the seizure of the material. The court held that the burden was on the owner of the bookstore to initiate proceedings in the Municipal Court, seeking return of the material under §1538.5, with appellate review prior to trial in the higher courts if the owner was unsuccessful. It should be noted that there are no time limitations contained in the state statute for final judicial determination of such proceedings. Finally, the Court of Appeal held that in connection with the execution of a search warrant limited to specifically named publications, police officers could seize indiscriminatorily any other publications which they deemed to be obscene, even though not named in the search warrant, and that such material did not have to be returned to the proprietor of the bookstore.

D. The petitioner filed a due and timely petition for hearing by the California Supreme Court. It was urged in the petition that the seizure and suppression

of the publications without a prior adversary hearing to determine the alleged obscenity of the material constituted a prior restraint on the exercise of freedom of expression; that the state statutory search and seizure procedures, on their face and as construed and applied to permit the State to retain possession of publications judicially determined to have been illegally seized, pending a hearing to determine whether the material was obscene, was constitutionally impermissible; that the state statutory search and seizure procedures, on their face and as construed and applied to authorize the seizure and suppression of the publications, based upon a police officer's conclusionary affidavit and a magistrate's perusal of only three of the thirty-five different titles seized, and upon a mere probable cause standard, rendered the statutes unconstitutional; that the statutory search and seizure procedures failed to meet the constitutional standards and criteria of timeliness enunciated by the Court in *Freedman*; and that all of the aforesaid violated the free speech and press, due process, equal protection, and search and seizure provisions of the First, Fourth and Fourteenth Amendments to the United States Constitution.

As aforestated, the petition for hearing was denied without written opinion by the California Supreme Court on August 13, 1971 (Appendix D).

Reasons for Granting the Writ.

1. The seizure and suppression of books and magazines, without a prior adversary hearing to determine the alleged obscenity of the publications seized, constitutes a prior restraint on the exercise of freedom of expression, in violation of the free speech and press, due process, and search and seizure provisions of the First, Fourth and Fourteenth Amendments. This fundamental postulate was enunciated in the decision of the Court in *Quantity of Copies of Books v. Kansas*, 378 U.S. 205, and the Court has never deviated from this principle. See, *Dombrowski v. Pfister*, 380 U.S. 479, 494; *United States v. Robel*, 389 U.S. 258, 277-278; *Freedman v. Maryland*, 380 U.S. 51, 58; *Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175, 181-182.

The *Books* ruling was followed in *Bethview Amusement Corp. v. Cahn*, 416 F.2d 410 (2 Cir. 1969), *cert. denied* 397 U.S. 920; *Tyrone, Inc. v. Wilkinson*, 410 F.2d 639 (4 Cir. 1969), cert. denied 396 U.S. 985; *208 Cinema, Inc. v. Vergari*, 298 F.Supp. 1175 (D.C. N.Y. 1969), reversed in open court Oct. 9, 1969, ...F.2d..... (2 Cir.) Docket No. 33997, cert. denied 397 U.S. 934; *United States v. Alexander*, 428 F.2d 1169 (8 Cir. 1970); *Wilhelm v. Turner*, 431 F.2d 177 (8 Cir. 1970), cert. denied *sub nom. Turner v. Wilhelm*, 91 S.Ct. 919 (March 1, 1971); *Cambist Films, Inc. v. Duggan*, 420 F.2d 687 (3 Cir. 1969); *Metzger v. Pearcy*, 393 F.2d 202 (7 Cir. 1968); *Demich, Inc. v. Ferdon*, 426 F.2d 643 (9 Cir. 1970), vacated and remanded 91 S.Ct. 1223.

The Court has emphasized that a "system of prior restraints of expression come to this Court bearing a heavy presumption against its constitutional validity".

Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70; *Freedman v. Maryland*, 380 U.S. 51, 57. In *Marcus v. Search Warrants of Property*, 367 U.S. 717, 736, the Court noted that no prior decision of the Court supported the proposition that a State could impose extensive restraints on the distribution of publications prior to an adversary proceeding on the issue of obscenity, irrespective of whether or not the material was legally obscene. In *Books*, the Court concluded "that in not first affording P-K an adversary hearing, the procedure leading to the seizure order was constitutionally deficient" (378 U.S. at 211).

The import of the decisions of the Court is that *ex parte* restraints in areas where First Amendment issues are implicated cannot be sustained. An adversary proceeding ordinarily affords both parties an opportunity to participate. Judgment as to whether the drastic sanction of suppression of publications should be imposed turns upon consideration of standards and criteria which are concededly imprecise. In the absence of participation by both sides in aiding the judicial officer to make an appropriate judgment, there is danger that rights of individuals and rights of the community in First Amendment freedoms may be impaired.

An adversary hearing reduces the possibility of an illegal seizure of expression alleged by police officers to be obscene. An adversary proceeding facilitates close judicial scrutiny of the material, which is particularly desirable in light of the fact that there will be greater assurance that a judicial official will be attentive to the governing legal and constitutional principles in this complex area. Such a hearing will give some assurance that only items found to be obscene will be subject to seizure, thereby preventing the suppression of non-

obscene material for long periods of time. In turn, this reduces the financial burdens of a seizure of material where such seizure sometimes means that an individual is compelled to bear onerous financial burdens, often resulting in arbitrarily putting the individual out of business. Finally, an adversary proceeding will help to insure the public's right to unobstructed dissemination of constitutionally protected matter.

The state court below placed reliance upon state decisions holding that prior adversary hearings are not required before seizure of books, magazines and other media of communication, allegedly obscene. California construes its statutory search and seizure procedures to authorize an *ex parte* determination of probable cause to believe that material is obscene prior to the issuance of a search warrant. California holds that following the seizure a hearing can be obtained, and if the owner is unsuccessful, relief can be obtained under California Penal Code §1538.5 by appeal in misdemeanor cases such as the one presented herein. Yet, the Court stated in *Books:* "Nor is the order under review saved because, after all 1,715 copies were seized and removed from circulation, P-K News Service was afforded a full hearing on the question of the obscenity of the novels. For if seizure of books precedes an adversary determination of their obscenity, there is danger of abridgment of the right of the public in a free society to unobstructed circulation of nonobscene books." 378 U.S. at 212-213.

Reliance by the court below upon *Younger v. Harris, Perez v. Ledesma* and *Milky Way Productions, Inc. v. Leary* appears misplaced. The first two decisions dealt solely with an issue of federal intervention in pending state criminal prosecutions. The third case involved an

issue which dealt with the right of an adversary hearing prior to arrest. Such issue poses different constitutional questions than ones involving the seizure and suppression of media of communication without any adversary hearing before a judicial officer. In the latter case, there is immediate obstruction of the circulation of nonobscene material in the community.

Indeed, the references to such decisions as *Perez* emphasize the importance of review of the judgment of the state court in this case. The Court has held that federal courts should initially stay their hand and give state courts the opportunity to decide constitutional claims presented by the citizens. The duty rests upon state courts to enforce the Constitution and laws of the United States, anything in the "laws of any State to the contrary notwithstanding". (Constitution, Article VI). The court below has disregarded the plain import of the free speech and press provisions of the Constitution of the United States and the interpretive decisions of the Court. This presents a substantial question which should be decided by the Court.

2. Moreover, the state statutory search and seizure procedures are constitutionally infirm for other significant reasons. As heretofore stated, the municipal court had directed the return of all books which had not been named in the search warrant and which nevertheless had been seized by the police officers. The court of appeal below held that such order was "improper and must be vacated under the holding of Aday v. Superior Court, supra, p. 800". (Appendix A). The decisions of this Court subsequent to *Aday v. Superior Court* have recognized no state power to retain possession of books, magazines or films judicially determined to have been illegally seized. *Marcus v. Search Warrants*

of Property, 367 U.S. 717; *Quantity of Copies of Books v. Kansas*, 378 U.S. 205. The Court states in *Books:* "Here, as in Marcus, 'since a violation of the Fourteenth Amendment infected the proceedings, in order to vindicate appellants' constitutional rights' 367 U.S., at 738, 81 S.Ct., at 1719, the judgment resting on a finding of obscenity must be reversed." (378 U.S. at 213).

The ruling of the court below, construing the state statutory search and seizure procedures to authorize *ex parte* searches and seizures without prior adversary hearings, and authorizing, in addition, warrantless seizures of publications deemed by police officers to be "obscene", plainly violates the First, Fourth and Fourteenth Amendments to the Constitution and the interpretive decisions of this Court.

3. The protection of First Amendment rights depends upon adherence to certain essential procedural requirements prior to suppression of material ordinarily protected by the First Amendment. Thus, before a State may seize and suppress material, the law must make provision for the initiation of judicial review by those officials who propose to seize or suppress alleged obscene material, and the burden rests upon such officials to prove that the material is obscene. Furthermore, prompt judicial review is mandatory. The state statutory search and seizure procedures herein place no burden upon the police officer who seizes the material to go to court within a specified brief period of time. There is no time limitation on the suppression in advance of a final judicial determination, and there is no assurance of a "prompt final judicial decision". The state statutory search and seizure procedures fail to meet the constitutional standards and criteria enunci-

ated by the Court. *Blount v. Rizzi*, 400 U.S. 410; *Freedman v. Maryland*, 380 U.S. 51; *Teitel Film Corp. v. Cusack*, 390 U.S. 139.

Under the procedures herein, not only does suppression of the material take place without an adversary hearing before a judicial officer, but suppression may continue for a lengthy period of time after the seizure, solely upon the basis of a finding by a magistrate that there was "probable cause" to justify the seizure based solely on the *ex parte* consideration of a police officer's conclusionary affidavit. If a §1538.5 adverse order must wait upon an "appeal", which may take months for determination after the seizure of the material and its withdrawal from the market, then the access of the public to what may eventually turn out to be constitutionally protected material is completely obstructed. Such a limited, inadequate and contingent right of appeal is contrary to the demands of the First and Fourteenth Amendments.

4. State statutory search and seizure procedures which authorize the seizure and suppression of books, magazines and other media of communication, solely upon a finding of "probable cause", without an actual determination of obscenity either prior to or subsequent to seizure, are merely official authorization for systems of censorship and prior restraint. The Court has held that a "probable cause" standard is constitutionally insufficient to support a seizure and suppression of material ordinarily protected by the First Amendment. In effect, the statute authorizes the exclusion of all evidence bearing on the nonobscenity of the material and its right to constitutional protection, while permitting a holding that the material is "probably" obscene. Such palpable prior restraint is unconstitutional and invalid.

Blount v. Rizzi, 400 U.S. 410; *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58.

5. The material herein involved is not obscene and is entitled to constitutional protection. The books and magazines have been seized and suppressed without a prior adversary hearing. The statutes place no time limits on the extent of suppression. The burden has been placed entirely upon the petitioner for obtaining redress. Even at the hearing subsequent to seizure, a finding of "probable cause" has been sustained solely upon the baseless affidavit of a police officer which is conclusionary and palpably insufficient. The seizure has been justified solely upon a finding of probable cause and petitioner has even been denied the right to review such finding of probable cause promptly, the petitioner being relegated to a time-consuming appeal.

Under the state obscenity statute and the state statutory search and seizure procedures, as aforestated, the standards for seizure of material ordinarily entitled to First Amendment protection are not capable of objective measurement. Police officers and magistrates have been vested with unfettered discretion to suppress books, magazines and other material which are entirely lawful and entitled to constitutional protection.

Thus, the case herein presents questions of substantial importance which should be decided by the Court. The importance of the problem is accentuated by the conflicting views of the state and federal courts and the perceptible increase in seizures since the decision herein of alleged obscene materials in theaters and bookstores throughout the community without regard to the procedural and substantive safeguards of the Constitution and the rulings of the Court.

Conclusion.

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeal of the State of California in and for the First Appellate District, Division Two.

Respectfully submitted,

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APPENDIX A.

Opinion and Judgment of the Court of Appeal of the State of California in and for the First Appellate District, Division Two.

In the Court of Appeal of the State of California, First Appellate District, Division Two.

People of the State of California, Plaintiff and Respondent, v. Paul Chapman, Defendant and Appellant. 1 Crim. No. 9131 (Superior Court Appellate Department CR No. 409; Municipal Court No. 12662) Filed May 26, 1971.

The appellate department of the Superior Court of Alameda County has certified to this court on its own motion and we have accepted the instant case which involves a prosecution under Penal Code, section 311.2 (sale or distribution of obscene matter). The case reached the appellate department on appeal from the denial by the municipal court of a motion to suppress evidence seized under a search warrant, the motion being made pursuant to Penal Code, section 1538.5, et seq. The appellate department affirmed the order of the municipal court as to books and magazines *purchased by the officer from defendant* and alleged to be obscene. *The order was reversed as to the allegedly obscene books and magazines which were seized under a search warrant issued ex parte.*

The facts are undisputed. On September 23, 1969, a search warrant authorizing the search of the Readmore Books Store in Fremont was issued by the Municipal Court for the Fremont-Newark-Union City Judicial District of the County of Alameda. The search warrant *described by name* 30 magazines and paperback books alleged to be in the possession of Paul

Chapman and on the premises of the Readmore Books Store at 129 Anza Street in Fremont. The warrant issued upon the affidavit of Leroy Pyle, a detective of the Fremont Police Department who had previously purchased some of the magazines and had looked at parts of the paperback books. The affidavit described the pictures and activity depicted in the material in graphic detail and concluded with the belief of the detective that the magazines and paperback books were obscene and appealed to prurient interest. The affidavit also alleged that the judge had seen the magazines "21" and "His and Hers" and that he had read parts of the paperback book entitled "The Unwilling Switchers" and was of the opinion the matter was obscene.

On September 23, 1969, pursuant to the authorization in the warrant, the Readmore Books Store was searched and the magazines and paperback books seized were listed on the return to the search warrant. A total of 47 magazines and 31 paperback books were taken. Some magazines not named in the search warrant were taken.

On September 23, 1969, a complaint issued in the Municipal Court for the Fremont-Newark-Union City Judicial District, County of Alameda, charging Paul Chapman in two counts with committing misdemeanors. Count one set forth a violation of section 311.2 of the Penal Code on September 19, 1969, in that he "wilfully and knowingly offered to distribute and had in his possession with intent to distribute, and distributed obscene matter, to wit: two obscene magazines and an obscene paperback book:"

The second count alleged that on September 22, 1969, the defendant violated section 311.2 of the Penal

Code in that he "wilfully and knowingly offered to distribute and had in his possession with intent to distribute, and distributed obscene matter, to wit: an obscene magazine."

On September 23, 1969, at the time of the seizure under the search warrant, defendant Paul Chapman was arrested pursuant to an arrest warrant and released on $1,000 bail.

On September 29, 1969, an amended complaint issued charging Chapman with additional counts of violating section 311.2 of the Penal Code, naming paperback books and magazines seized in the search.

On December 23, 1969, defendant Chapman made a motion to suppress evidence and for the restoration of property seized under the search warrant pursuant to sections 1538.5, 1539 and 1540 of the Penal Code.

On February 11, 1970, the municipal court ordered that the books seized by the police which were not listed on the warrant be returned to the defendant and denied the motion to suppress as to all the other books seized in the search warrant with the exception of "Pimp: The Story of My Life," which it found to be not obscene within the constitutional sense.

On February 20, 1970, defendant Chapman filed a notice of appeal to the appellate department of the superior court.

On July 15, 1970, the appellate department of the superior court entered the order with which we are concerned. In making said ruling, the department relied upon People v. deRenzy (1969) 275 Cal.App.2d 380, and explains its action by pointing to the holding in deRenzy (p. 386) where the court states that "law enforcement officers, acting under authority of a search

warrant, may seize at least one copy of an alleged obscene book, film, or other material when necessary for use as evidence in a later adversary proceeding, without doing violence to the First or Fourth Amendment," but in another portion of the opinion it is stated that "We recognize that there may be circumstances where, by fortuity, obscene matter may be produced by the state without need of search or seizure or court process, e.g., *books offered for public sale. In such cases any seizure without prior adversary proceedings obviously would be constitutionally impermissible*" (p. 384; emphasis added) and that feeling governed by the latter statement it ruled as it did even though it considered the observation dicta.

The defendant's contentions before the appellate department were: (1) that Penal Code, section 311.2, was unconstitutional by reason of the United States Supreme Court's decision in Stanley v. Georgia (1969) 394 U.S. 557, and (2) that a prior adversary hearing must be conducted before a search warrant may be issued for a seizure of books and magazines alleged to be obscene, when such publications are available for public sale.

As to the first contention, the appellate department ruled that the section attacked was constitutional and was not affected by Stanley v. Georgia, supra, a ruling that anticipated the holding of our Supreme Court in People v. Luros (1971) 4 Cal.3d 84, wherein a like argument was held to be without merit.

As to the second contention, we likewise conclude that the Luros case disposes of it.

In Luros, the trial court had set aside an indictment under Penal Code, section 311.2, because the prosecution failed to present evidence to the grand

jury of contemporary community standards. The trial court recognized that its ruling was in conflict with the holding of Aday v. Superior Court (1961) 55 Cal. 2d 789, 798, and People v. Aday (1964) 226 Cal. App.2d 520, 531-532, but was of the view that those cases had been overruled by more recent decisions. However, our Supreme Court in Luros points out that the two Aday cases were correctly decided and are the law today. In Aday v. Superior Court, supra, the magistrate had issued a search warrant which authorized seizure of two named books alleged to be obscene; the magistrate had read portions of the two named books which had been purchased by a police officer before issuing the warrant, but had not received evidence as to contemporary community standards; the Supreme Court examined the books in light of the test for obscenity set forth in Roth v. United States (1957) 354 U.S. 476, 487-489, " 'whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest,' " (Aday v. Superior Court, supra, p. 798) and came to the conclusion that there was probable cause to believe them obscene, and that it is "not necessary . . . to . . . receive evidence as to contemporary community standards in order to determine the issue of probable cause." (Aday v. Superior Court, supra, p. 798.) The Supreme Court in Luros quotes from the Aday case as follows: " 'Where, as here, the seizure occurs under a warrant, *an ex parte determination* of the issue of obscenity, so far as probable cause is concerned, has taken place before issuance of the warrant, and immediately *after the seizure* a determination of the issue to that extent can be obtained in *adversary proceedings* by controverting the warrant under

sections 1539 and 1540 of the Penal Code. In the event the owner is unsuccessful in that proceeding, final determination as to obscenity will be had in the criminal action which will ordinarily follow within a reasonable time, or other remedies such as mandamus will be available to secure return of the property.' (*Aday v. Superior Court, supra,* 55 Cal.2d at p. 799.)" (People v. Luros, supra, p. 88; emphasis added.)

Subsequent to the Aday cases, the Legislature added section 1538.5 to the Penal Code (Stats. 1967, ch. 1537, § 1, p. 3652), which provides that a defendant may move for the return of property or to suppress as evidence any tangible or intangible thing obtained as a result of a search or seizure, with attendant provisions for review by mandamus or appeal, the remedy employed by the defendant in this case and the avenue by which he reached this court.

The issue of the necessity for a prior adversary hearing was before the United States Supreme Court in Perez v. Ledesma (decided February 23, 1971; 39 U.S.L. Week 4214, ... U.S. .....) In that case, a three-judge federal court had ruled that the arrest of a newsstand operator and the seizure of allegedly obscene material were invalid *for lack of a prior adversary hearing on the character of the seized materials,* and had entered a suppression order requiring the return of all the seized material. The United States Supreme Court based its reversal of the order on Younger v. Harris, decided the same day,[1] and therefore had no

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[1]In Younger v. Harris (No. 2, 39 U.S.L. Week 4208, 4209, ... U.S. ....., decided February 23, 1971), the United States Supreme Court held that a federal court must not, save in exceptional and extremely limited circumstances, intervene by way of either injunction or declaration in an existing state criminal prosecution.

occasion to consider the holding of the three-judge court that the seizures and the arrest of Ledesma could not be constitutionally undertaken prior to an adversary judicial determination of obscenity.

In a footnote in a concurring and dissenting opinion by Mr. Justice Brennan, however (fn. 2, 39 U.S.L. Week 4218), the United States Supreme Court noted that it had affirmed a judgment in a case containing a contrary view as to the necessity of a hearing prior to an arrest for obscenity in Milky Way Productions, Inc. v. Leary (S.D.N.Y. 1969) 305 F.Supp. 288, 295-297, affirmed sub nom., New York Feed Co., Inc. v. Leary (1970) 397 U.S. 98.

The court in Milky Way Productions, Inc. v. Leary characterized the asserted requirement of a preliminary adversary hearing as a "novelty" that had gained acceptance in several courts, but it could find nothing in the First Amendment to mandate its acceptance of such an innovation, concluding that "traditional criminal prosecutions, with their procedural safeguards, are surely permissible, and very possibly preferred, vehicles for enforcing bans against obscenity." The court then ruled: "At any rate, we find no warrant in the First Amendment or the cases that give it full meaning for compelling the radical change plaintiffs seek in state (and, presumably, federal) criminal procedures affecting obscenity cases." (Milky Way Productions, Inc. v. Leary, supra, p. 297.)

There have been a number of opinions entered by the federal district courts of California requiring magistrates to conduct prior adversary hearings before issuing a search warrant. On March 29, 1971, the United States Supreme Court vacated the Ninth Circuit Court of Ap-

peals affirmance of those opinions (Demich, Inc. v. Ferdon, 426 F.2d 643). (See Ferdon v. Demich, 39 U.S.L. Week 3420, ... U.S. .....)

The language from the deRenzy opinion relied upon by the appellate department is clearly dicta, uttered without citation of authority and is in direct conflict with the holding of that case and an accepted line of authority supporting narrow evidentiary seizures. (See Mishkin v. New York (1966) 383 U.S. 502, 513, and Rage Books, Inc. v. Leary (1969) 301 F.Supp. 546.)

There remains for disposition the order made herein whereby all the publications that were not named in the search warrant were to be returned to the defendant. Such order was improper and must be vacated under the holding of Aday v. Superior Court, supra, p. 800.

The judgment reversing the municipal court order which denied the motion to suppress certain allegedly obscene books and magazines is reversed. The order of the municipal court directing the return of such obscene material as was not named in the search warrant is vacated.

Shoemaker, *P. J.*

We Concur:
Taylor, *J.*
Kane, *J.*

APPENDIX B.

Opinion and Judgment of the Superior Court of the State of California in and for the County of Alameda, Appellate Department.

In the Superior Court of the State of California in and for the County of Alameda, Appellate Department.

The People of the State of California, Plaintiff and Respondent, vs. Paul Chapman, Defendant and Appellant. NO. 409.

Filed July 15, 1970.

DECISION

Appeal from an order of the Municipal Court for the Fremont-Newark-Union City Judicial District denying Defendant's motion to suppress evidence pursuant to Section 1538.5 of the Penal Code. Roy B. Pucci, Judge. Affirmed in part and reversed in part.

Attorneys for Defendant and Appellant: Stanley Fleishman, Richard L. Chesney and Robert C. McDaniel.

Attorneys for Plaintiff and Respondent: Lowell Jensen, District Attorney, by T. W. Condit and Rollie Pennington, Deputy District Attorneys.

BY THE COURT: Defendant is being prosecuted in the Municipal Court for a violation of Section 311.2 of the Penal Code of California for wilfully and knowingly offering to distribute and having in his possession with intent to distribute obscene magazines and paperback books. The evidence against him was acquired in part by the purchase of certain allegedly obscene magazines and paperback books. Later additional material of similar nature was seized under a search warrant issued out of that court. Motion

was made to suppress all of this evidence under Section 1538.5 of the Penal Code. Defendant takes this appeal following a denial of said motion.

On September 19, 1969, Detective Pyle of the Fremont Police Department went to the "Readmore Book Store" in Fremont and purchased two magazines and a paperback book. This merchandise is before the court as People's Exhibit Numbers 2, 3 and 4.

On September 22, 1969, the same Detective purchased two more magazines from the same store which are before the court as People's Exhibit Numbers 6 and 7. These comprise the evidence against Defendant which was acquired by the police through purchases made from Defendant in the book store he is alleged to operate in Fremont.

On September 22, 1969, Detective Pyle went to Defendant's book store equipped with a radio transmitter secreted on his person. Detective Cox equipped with a radio receiver positioned himself outside the store. Pyle observed the contents of various magazines and paperback books, leafing through the magazines and books, and reading titles thereof to Detective Cox. All the publications, which were later listed on the search warrant, were looked at on the premises by Detective Pyle either on September 19th or on September the 22nd.

Officer Pyle thereafter prepared, with the aid of a Deputy District Attorney, the affidavit and search warrant. These documents were then taken to a Judge of the Municipal Court together with People's Exhibit Numbers 2, 3, 4, 6 and 7. After examining the Exhibits and reading the affidavit, the Judge issued the search warrant in question without prior adversary proceed-

ings. The actual seizures totaled 78. Some books and magazines that were seized were not named in the search warrant. Others constituted the seizure of 28 books and magazines named in the warrant, although in some cases, more than one copy of a named magazine or book was taken. At the time of these seizures, Defendant was arrested and charged with violating Section 311.2 of the Penal Code. His motion under Section 1538.5 of the Penal Code to suppress all of this evidence was granted as to the books and magazines which were seized but not named in the search warrant. His motion was denied as to Exhibit Numbers 2 through 4 and Exhibit Numbers 6 and 7 which were acquired by purchase, and Exhibit Numbers 8 through 27 which were acquired by use of the search warrant. His motion was granted as to Exhibit Number 28, the court having failed to find that book to be obscene.

The Defendant seeks to suppress the evidence on numerous grounds but consideration of only three seem necessary to resolve the appeal now before us.

1. Are the books and magazines in question obscene or are they protected by the First Amendment?
2. Is the California obscenity statute, Penal Code 311.2, unconstitutional on its face and as construed?
3. Was the search warrant used to seize certain of the evidence properly issued?

FOR PURPOSES OF THIS MOTION, THE BOOKS AND MAGAZINES NOW BEFORE THE COURT ARE OBSCENE AND NOT PROTECTED BY THE FIRST AMENDMENT

In spite of the many cases dealing with obscenity during the last 12 years, none have nullified the declaration in *Roth v. United States* (1957) 354 U.S. 476 that obscenity is not protected by the First Amendment. Whereas, the cases have defined obscenity in various ways. The Legislature has considered these in finalizing the definition as it appears in the California obscenity statutes. We are concerned with its definition as set forth in Penal Code Section 311.[1] This appeal is from the ruling on a motion under 1538.5 of the Penal Code to suppress evidence and not a trial on the merits. Therefore, the court must decide whether or not the books and magazines in question are "probably obscene" as defined in that Section. Evidence was taken and the trial Judge failed to find People's Exhibit Number 28.

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[1]Section 311 states:

"As used in this chapter:

(a) "Obscene" means that to the average person applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance.

(b) "Matter" means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statue or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

(c) "Person" means any individual, partnership, firm, association, corporation, or other legal entity.

(d) "Distribute" means to transfer possession of, whether with or without consideration.

(e) "Knowingly" means having knowledge that the matter is obscene."

to be obscene. The contents of People's Exhibit Numbers 2 through 4 and People's Exhibit Numbers 6 and 7 and People's Exhibit Numbers 8 through 27 was found to be obscene and, as to them, the motion to suppress was denied. Such a pretrial finding on the question of obscenity has been recognized in this state. (*People v. Noroff* (1967) 67 Cal. 2d 791, 793).

In *People v. Bonanza* (1969) 271 Cal. App. 2d Supp. 871, 873, both probable cause and a pretrial determination of the constitutional fact of obscenity was presented to the court under Penal Code Section 1538.5 proceedings. The issue having been thus raised, the court allowed the owner of the seized property to attack the lawfulness of the seizure on the ground that there was no reasonable cause to believe that the evidence in question was obscene. The same procedure was followed in the case at bench.

THE CALIFORNIA OBSCENITY STATUTE IS CONSTITUTIONAL ON ITS FACE AND AS CONSTRUED

Appellant contends that Penal Code Section 311.2 is unconstitutional in the light of the recent ruling of the United States Supreme Court in *Stanley v. Georgia* (1969), 394 U.S. 557. There the Georgia staute, which made it a crime to possess obscene materials, was held to be unconstitutional. The Georgia statute can be distinguished from Penal Code 311.2. The California obscenity statute[2] makes it a misdemeanor to possess

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[2]The Pertinent part of Section 311.2 states:

"(a) Every person who knowingly sends or causes to be sent, or brings or causes to be brought into this state for sale or distribution, or in this state prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor."

the objectionable merchandise *for sale or distribution.* The commercial aspect of obscene magazines and books is to be distinguished from mere possession thereof. (*In re Klor* (1966), 64 Cal. 2d 816, 820.) The United States Supreme Court in *Roth v. United States,* having determined that obscenity was not protected by the First Amendment, the several states are free to regulate and suppress such matters by virtue of their constitutionally reserved police power. (*Flack v. Mun. Court* (1967) 66 Cal. 2d 981, 986). The California obscenity statute was found to be neither unconstitutionally vague nor in violation of First Amendment rights in *Miller v. Reddin* (1968) 293 Fed. Supp. 216. Although several Federal District Court decisions have cast doubt upon the validity of Penal Code 311.2, they are not controlling upon the courts in California until or unless they are declared unconstitutional by the United States Supreme Court. (*People v. De Renzy* (1969) 275 A.C.A. 419, 422; *People v. Willard* (1965) 238 Cal. App. 2d 293, 305). Therefore, in spite of the recent case of *United States v. Athena Books,* C.R.S. 884 U.S.R. Eastern District of California, this court must hold that Penal Code 311.2 is constitutional.

THE SEARCH WARRANT WAS IMPROPERLY ISSUED IN THIS CASE

One of the compelling reasons for strict application of restraints on seizure of magazines, books and films is to protect against mass seizure. Such a seizure often results in irreparable damage to the possessor, distributor or exhibitor of the alleged obscene materials without prior adversary hearing to enable fair evaluation of the legal rights involved. The parent decision was *A Quantity of Books v. Kansas* (1964) 378 U.S. 205. In that

case, the court by ex parte order authorized the seizure of *all copies* of 57 books designating them by title. More than 1700 copies of these books were thereupon seized. Such use of a search warrant could hardly be called gathering evidence. It amounted to virtual confiscation. The parties adversely affected could be ruined by such a seizure even if it were later determined to be without merit. No safeguards to protect legitimate expression exist in such cases. Both Federal and State Courts have thereafter ruled on this question. A broader application of mass seizure has developed especially in the case of moving picture films. The seizure of one or two films, where they constitute all of the prints of the moving picture involved, have been held to constitute a mass seizure where cancellation of advertised showings of the film have resulted. (*Bethview Amusement Corp. v. Cohn* (2nd Cir.; 1969) 416 Fed. 2d 410; *Tyrone Inc. v. Wilkinson* (4th Cir; 1969) 410 Fed. 2d 639).

Therefore, the common denominator found in all Federal cases seems to be the possibility of unconstitutional restraints on free expression. This principle is recognized in *People v. De Renzy* (supra). But in that case, the court goes on to say at Page 425 that nothing is found in the Federal cases ". . . that condemns a narrow, discriminatory seizure under a search warrant issued upon a reasonable finding of probable cause therefor by a magistrate, of so much obscene material as is reasonably necessary for a later adversary proceeding." It went on to say that officers may seize ". . . at least one copy of an alleged obscene book, film or other material when necessary for use as evidence . . .". A divided court in *Demich Inc. v. Ferdon* (May 13, 1970 in 9th Circuit U.S. Court of Appeals;

Consolidated actions 24959 to 24961 and 24976), suppressed moving picture films seized without prior adversary proceedings under facts similar to De Renzy. However, this court must follow the decisions of the Appellate Courts of California until or unless the United States Supreme Court acts on the question. (*Auto Equity Supply v. Superior Court*, (1962) 57 Cal. 2d 45 f, 455).

The undisputed evidence in the case at bench establishes that all of the books and magazines in question were openly available for public sale to adults in a retail establishment ostensibly operated by Defendant. Indeed part of the evidence (People's Exhibit Numbers 2, 3, 4, 6 and 7) were purchased by the police prior to the seizure and the arrest. This raises the important question as to whether, under such circumstances, a seizure is permissible in the absence of a prior adversary proceeding.

In *People v. De Renzy* (supra) at Page 423, the court says: "We recognize that there may be circumstances where, by fortuity, obscene matter may be produced by the state without need of search or seizure or court process, e.g., books offered for public sale. In such cases, any seizure without prior adversary proceedings obviously would be constitutionally impermissible." This language was dicta in the De Renzy case because only a motion picture film was involved. But this direct indication of the court's view as to seizure of books offered for public sale, as in the case at bench, indicates agreement with the Federal decisions requiring prior adversary hearings before seizure wherever reasonably possible.

We, therefore, reverse the order denying Defendant's motion to suppress People's Exhibit Numbers 8 through

27. These were books and magazines seized pursuant to the search warrant. We affirm the order denying said motion as to People's Exhibit Numbers 2, 3, 4, 6 and 7. These were the magazines and book acquired through purchase.

/s/ Donald K. Quayle
Presiding Judge of the Appellate Dept.

We concur:

/s/ Monroe Friedman, *Judge*

/s/ William H. Brailsford, *Judge*

APPENDIX C.

Opinion of the Honorable Roy G. Pucci, Judge of the Municipal Court—Excerpt From Reporter's Transcript on Appeal.

In the Municipal Court for the Fremont-Newark-Union City Judicial District, County of Alameda, State of California. Before Honorable Roy G. Pucci, JUDGE.

The People of the State of California, Plaintiffs, vs. Paul Chapman, Defendant. DEPT. 1, NO. 12662; CHARGE: 311.2 P.C.

REPORTER'S TRANSCRIPT ON 1538.5, 1359 and 1540 HEARING

CITY OF FREMONT, COUNTY OF ALAMEDA, STATE OF CALIFORNIA

MONDAY, FEBRUARY 2, 1970—1:45 O'CLOCK P.M.

TUESDAY, FEBRUARY 3, 1970—8:45 O'CLOCK A.M.

APPEARANCES

For the People: T. W. Condit Deputy District Attorney.

For the Defendant: Robert McDaniel Attorney at Law.

THE DEFENDANT IS PRESENT IN COURT

* * *

THE COURT: All right. As to those books which were seized by the Police Department, which were not listed in the warrant, the Defendant's motion to suppress will be granted.

Now, those are the ones that are marked, I believe, A, B, C, D and E. You have those, here, and if I recall, those are the ones that were not listed in the affidavit

upon which the search warrant was issued. I marked those separately at the time of the hearing. They are the ones that do not have a number; but I think they do have a letter—alphabetical letter. Well, it is easily determined. You can go and check the return of the affidavit, then.

MR. MC DANIEL: I have a list of those, here.

THE COURT: So that the record is clear—

MR. MC DANIEL: It goes A—Peoples' A through H.

THE COURT: Peoples' A through H. Defendant's motion to suppress will be granted. And, further, the Court will make no findings as to whether or not they are obscene because of the probability that the "fruit of the pot" is a doctrine that will be followed. If they are illegally seized, the Court shouldn't rule, even though the Police Department can go out and buy those books.

I will not rule those obscene; I will order those as returned to the Defendant. As to all of the other books that were seized in the search warrant, the motion to suppress is denied. The Court will find that they were obscene in the constitutional sense, and this is a issue to be tried before a jury: that is, all of the other books that were listed in the search warrant, with one exception: "Pimp: The Story of My Life" which is vulgar and contains words that I thought I had heard all of them until I read that book, but may have some socially redeeming value, because it purports to be a story, and I will rule that that is not obscene in the constitutional sense. That is item Number 30 listed in the warrant—in the affidavit—for the search warrant, "The Story of My Life." I'll point it out. Let me have that.

Let the record also reflect that I have read all of the books that were submitted.

MR. MC DANIEL: Did you compare those with—

THE COURT: "The Story of My Life"?

THE CLERK: That is Number 28.

THE COURT: I will rule that that book is not obscene in the constitutional sense, but all of the others are that were listed on the affidavit.

MR. MC DANIEL: Did you compare any of these materials with the materials found not obscene?

THE COURT: I read them all and compared and weighed all of the testimony in this case.

MR. MC DANIEL: I'll give you oral notice of appeals of these rulings at this time.

THE CLERK: You said, A through H could be returned to the Defendant?

THE COURT: Yes.

The motion to suppress A through H is granted, because they were not listed in the search warrant—they were not listed in the affidavit, rather—but all of the books that were listed under the search warrant—with that one exception—the motion is denied, and I make a finding that they are obscene in the constitutional sense, with the exception of "The Story of My Life".

THE CLERK: Then, all of these are received in Evidence?

THE COURT: These are all of the motions that are before me.

MR. MC DANIEL: I would ask that your Honor revise the ruling on the obscenity to read, as follows: That you find you can't decide whether or not it's ob-

scene, and, therefore, presents an issue of fact. Otherwise, I think you have taken the province of the jury away from him.

THE COURT: I think it is an issue to go to the jury for the purposes of this hearing. They are obscene for the purposes of my ruling to go to the jury and be decided for the jury and the jury trial. I think whether or not they are obscene in the constitutional sense is against being obscene, per say [sic]. I am not saying they are obscene.

MR. MC DANIEL: That's the difference.

THE COURT: Well, that's the motion befofe me, made by the District Attorney.

MR. MC DANIEL: Well, there is no—

THE COURT: The motion to determine legal obscenity is this: (1) We are here, today, to rule on this case in the constitutional sense, as declared in PEOPLE VS. NOROFF; (2) We move to the Court to determine that the material is obscene, per say, and all I'm saying is that, there is obscenity to go to the jury.

MR. MC DANIEL: Well, if you are doing that then, you are not giving the jury a possibility of making a determination at all. You are directing them, which is improper.

THE COURT: No. There is an issue to go to the jury.

MR. MC DANIEL: Well, I'm giving you oral notice that your entire ruling—other than that on the part granting the motion as to A through H of the Peoples' exhibits—is hereby orally noticed as being appealed, and I will send in a formal notice of appeal within the time limit, which I believe is ten days.

THE COURT: All right.

MR. MC DANIEL: Thank you, your Honor.

THE COURT: All right.

MR. MC DANIEL: Oh, your Honor, could we reopen for one moment? I had indicated that I would ask to have returned certain of the exhibits to me at this time.

THE COURT: You introduced some of those into Evidence, didn't you?

MR. MC DANIEL: Yes, but it was with an agreement by everybody, I believe. I want the record to reflect quite clearly, that I will resubmit these during the time that we put the materials into the appeal. I ask them to be returned to me, at our prior agreement.

THE COURT: There was an agreement as to that effect.

Is there any objection?

MR. MC BRIDE: No objection.

MR. MC DANIEL: I'll give you—

THE COURT: With that condition, that you will return them.

MR. MC DANIEL: The numbers of those are Defendant's 7, Defendant's 4, Defendant's 5, Defendant's 2—and it's turned, I see—and Defendant's 6.

Thank you.

APPENDIX D.

Order and Judgment of California Supreme Court Denying Petition for Hearing.

Clerk's Office Supreme Court, 4250 State Building. San Francisco, California 94102.

Aug. 13, 1971

Dear Sir: I have this day filed Order

HEARING DENIED

In re: 1 Cr. No. 9131.

Peo vs. Chapman.

Respectfully,

G. E. Bishel
Clerk

APPENDIX E.

Constitutional and Statutory Provisions Involved.

1. The pertinent provisions of the First Amendment to the United States Constitution are:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; . . ."

2. The provisions of the Fourth Amendment to the United States Constitution are:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

3. The pertinent provisions of the Fourteenth Amendment to the United States Constitution are:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law; . . ."

4. California Penal Code §1538.5 provides as follows:

> "SPECIAL PROCEEDINGS
>
> § 1538.5 *Motion to return property or suppress evidence*
>
> (a) *Grounds.* A defendant may move for the return of property or to suppress as evidence any tangible or intangible thing obtained as a result of a search or seizure on the ground that:
>
> (1) The search or seizure without a warrant was unreasonable; or

(2) The search or seizure with a warrant was unreasonable because (i) the warrant is insufficient on its face; (ii) the property or evidence obtained is not that described in the warrant; (iii) there was not probable cause for the issuance of the warrant; (iv) the method of execution of the warrant violated federal or state constitutional standards; or (v) there was any other violation of federal or state constitutional standards.

(b) *First hearing.* When consistent with the procedures set forth in this section and subject to the provisions of Section 170 through 170.6 of the Code of Civil Procedure, the motion should first be heard by the magistrate who issued the search warrant if there is a warrant.

(c) *Evidence.* Whenever a search or seizure motion is made in the municipal, justice or superior court as provided in this section, the judge or magistrate shall receive evidence on any issue of fact necessary to determine the motion.

(d) *Effect of granting motion.* If a search or seizure motion is granted pursuant to the proceedings authorized by this section, the property or evidence shall not be admissible against the movant at any trial or other hearing unless further proceedings authorized by this section or Section 1238 or Section 1466 are utilized by the people.

(e) *Return of property.* If a search or seizure motion is granted at a trial, the property shall be returned upon order of the court unless it is otherwise subject to lawful detention. If the motion is granted at a special hearing, the property shall be returned upon order of the court only if, after

the conclusion of any further proceedings authorized by this section or Section 1238 or Section 1466, the property is not subject to lawful detention or if the time for initiating such proceedings has expired, whichever occurs last. If the motion is granted at a preliminary hearing, the property shall be returned upon order of court after 10 days unless the property is otherwise subject to lawful detention or unless, within that time, further proceedings authorized by this section or Section 1238 are utilized; if they are utilized, the property shall be returned only if, after the conclusion of such proceedings, the property is no longer subject to lawful detention.

(f) *Felony; motion at preliminary hearing.* If the property or evidence relates to a felony offense initiated by a complaint, the motion may be made in the municipal or justice court at the preliminary hearing.

(g) *Misdemeanor; pre-trial motion at special hearing.* If the property or evidence relates to a misdemeanor complaint, the motion shall be made in the municipal or justice court before trial and heard prior to trial at a special hearing relating to the validity of the search or seizure. If the property or evidence relates to a misdemeanor filed together with a felony, the procedure provided for a felony in this section and Sections 1238 and 1539 shall be applicable.

(h) *Motion at trial.* If, prior to the trial of a felony or misdemeanor, opportunity for this motion did not exist or the defendant was not aware of the grounds for the motion, the defendant

shall have the right to make this motion during the course of trial in the municipal, justice or superior court. Furthermore, the court in its discretion may entertain the motion during the course of the trial.

(i) *Felony; renewal of motion at special hearing; review.* If the property or evidence obtained relates to a felony offense initiated by complaint and the defendant was held to answer at the preliminary hearing, or if the property or evidence relates to a felony offense initiated by indictment, the defendant shall have the right to renew or make the motion in the superior court at a special hearing relating to the validity of the search or seizure which shall be heard prior to trial and at least 10 days after notice to the people unless the people are willing to waive a portion of this time. The defendant shall have the right to litigate the validity of a search or seizure de novo on the basis of the evidence presented at a special hearing. After the special hearing is held in the superior court, any review thereafter desired by the defendant prior to trial shall be by means of an extraordinary writ of mandate or prohibition filed within 30 days after the denial of his motion at the special hearing.

(j) *Relitigation of question after grant of motion; new evidence, review.* If the property or evidence relates to a felony offense initiated by complaint and the defendant's motion for the return of the property or suppression of the evidence at the preliminary hearing is granted, and if the defendant is not held to answer at the preliminary

hearing, the people may file a new complaint or seek an indictment after the preliminary hearing, and the ruling at the prior hearing shall not be binding in any subsequent proceeding. If the property or evidence relates to a felony offense initiated by complaint and the defendant's motion for the return or suppression of the property or evidence at the preliminary hearing is granted, and if the defendant is held to answer at the preliminary hearing, the ruling at the preliminary hearing shall be binding upon the people unless, upon notice to the defendant and the court in which the preliminary hearing was held and upon the filing of an information, the people within 10 days after the preliminary hearing request in the superior court a special hearing, in which case the validity of the search or seizure shall be relitigated de novo on the basis of the evidence presented at the special hearing, and the defendant shall be entitled, as a matter of right, to a continuance of the special hearing for a period of time up to 30 days. If defendant's motion is granted at a special hearing in the superior court, the people, if they have additional evidence relating to the motion and not presented at the special hearing, shall have the right to show good cause at the trial why such evidence was not presented at the special hearing and why the prior ruling at the special hearing should not be binding, or the people may seek appellate review as provided in subdivision (o) of this section, unless the court prior to the time such review is sought has dismissed the case pursuant to Section 1385. If the property or evidence seized relates solely to a misdemeanor com-

plaint, and the defendant made a motion for the return of property or the suppression of evidence in the municipal court or justice court prior to trial, both the people and defendant shall have the right to appeal any decision of that court relating to that motion to the superior court of the county in which such inferior court is located, in accordance with the California Rules of Court provisions governing appeals from municipal and justice courts in criminal cases. If the people prosecute review by appeal or writ to decision, or any review thereof, in a felony or misdemeanor case, it shall be binding upon them.

(k) *Release of defendant pending resumption of proceedings in trial court.* If the defendant's motion to return property or suppress evidence is granted and the case is dismissed pursuant to Section 1385, or the people appeal in a misdemeanor case pursuant to subdivision (j) or the people file a petition for writ of mandate or prohibition pursuant to subdivision (o) or a notice of intention to file such petition, the defendant shall be released if he is in custody and not returned to custody unless the proceedings are resumed in the trial court and he is lawfully ordered by the court to be returned to custody.

(l) *Stay; time for trial; dismissal; continuance; bail or release.* The trial of a criminal case shall be stayed to a specified date pending the termination in the appellate courts of the State of California of the proceedings provided for in this section, Section 1238, or Section 1466 and, except upon stipulation of the parties, pending the time for the

initiation of such proceedings. Upon the termination of such proceedings, the defendant shall be brought to trial as provided by Section 1382, and subject to the provisions of Section 1382, whenever the people have sought and been denied appellate review pursuant to subdivision (o) of this section, the defendant shall be entitled to have the action dismissed if he is not brought to trial within 30 days of the date of the order which is the last denial of the petition. Nothing contained in this subdivision shall prohibit a court, at the same time as it rules upon the search and seizure motion, from dismissing a case pursuant to Section 1385 when such dismissal is upon the court's own motion and is based upon an order at the special hearing granting defendant's motion to return property or suppress evidence. In a misdemeanor case, the defendant shall be entitled to a continuance of up to 30 days if he intends to file a motion to return property or suppress evidence and needs this time to prepare for the special hearing on the motion. In case of an appeal by the defendant in a misdemeanor case from the denial of such motion, he shall be entitled to bail as a matter of right, and, in the discretion of the trial or appellate court, may be released on his own recognizance pursuant to Section 1318.4.

(m) *Exclusive pre-trial remedy; review on appeal after conviction.* The proceedings provided for in this section, Section 995, Section 1238, and Section 1466 shall constitute the sole and exclusive remedies prior to conviction to test the unreasonableness of a search or seizure where the person making the motion for the return of prop-

erty or the suppression of evidence is a defendant in a criminal case and the property or thing has been offered or will be offered as evidence against him. A defendant may seek further review of the validity of a search or seizure on appeal from a conviction in a criminal case notwithstanding the fact that such judgment of conviction is predicated upon a plea of guilty. Such review on appeal may be obtained by the defendant providing that at some stage of the proceedings prior to conviction he has moved for the return of property or the suppression of the evidence.

(n) *Motions on other grounds; existing law and procedure.* Nothing contained in this section shall prohibit a person from making a motion, otherwise permitted by law, to return property, brought on the ground that the property obtained is protected by the free speech and press provisions of the federal and state constitutions. Nothing in this section shall be construed as altering (i) the law of standing to raise the issue of an unreasonable search or seizure; (ii) the law relating to the status of the person conducting the search or seizure; (iii) the law relating to the burden of proof regarding the search or seizure; (iv) the law relating to the reasonableness of a search or seizure regardless of any warrant which may have been utilized; or (v) the procedure and law relating to a motion made pursuant to Section 995 or the procedures which may be initiated after the granting or denial of such a motion.

(o) *People's petition for mandate or prohibition; notice of intention.* Within 30 days after a

defendant's motion is granted at a special hearing in the superior court, the people may file a petition for writ of mandate or prohibition, seeking appellate review of the ruling regarding the search or seizure motion. If the trial of a criminal case is set for a date which is less than 30 days from the granting of a defendant's motion at a special hearing in the superior court, the people, if they have not filed such a petition and wish to preserve their right to file such a petition, shall file in the superior court on or before the trial date or within 10 days after the special hearing, whichever occurs last, a notice of intention to file such a petition and shall serve a copy of the notice upon the defendant.

(Added by Stats. 1967, c. 1537, p. 3652, § 1.)"

APPENDIX F.

Search Warrant.

Municipal Court for the Fremont-Newark-Union City Judicial District, County of Alameda, State of California.

State of California, County of Alameda—ss.

SEARCH WARRANT

The People of the State of California to Any Sheriff, Constable, Marshal, Policeman or Peace Officer in the County of Alameda, State of California.

Proof by affidavit having been this day made before me by Leroy Pyle that heretofore and on or about September 22, 1969, in the City of Fremont, County of Alameda, State of California, the crime of 311.2 of the California Penal Code was committed by Paul Chapman in the manner following, to wit: by selling and possessing with intent to distribute obscene magazines and books.

That the following described articles and property (were used and are intended to be used as the means of committing the said public offense):

1. Magazines entitled EVES RIB, Vol. 1 No. 3
2. Magazines entitled HIS & HERS, No. 4
3. Magazines entitled "21", Vol. 2 No. 4
4. Magazines entitled FRENCH CURVES No. 1
5. Magazines entitled DUDE MOOD
6. Magazines entitled WENDYS WILD WEEK-END

That said articles, items and property constitute evidence which tends to show that a misdemeanor was committed and that the said Paul Chapman committed

said misdemeanor. That there is just, probable and reasonable cause to believe, and said affiant does believe that the above articles and property are now concealed upon the person of Paul Chapman and in and upon those certain premises, including all rooms and buildings used in connection with the premises and adjoining same, and in any receptacle or safe therein, which premises are commonly called and designated as The Readmore Books Store at 129 Anza Street, Fremont, County of Alameda, State of California.

You Are Therefore Commanded in the day or nighttime [(R.G.P.)] to make immediate search of the person(s) of Paul Chapman and of the premises above described for the said articles and property and if you find the same or any part thereof to bring it forthwith before me for disposition according to law.

Given Under My Hand and dated this 23rd day of September, 1969.

/s/ Roy G. Pucci

Judge of the Municipal Court for the Fremont-Newark-Union City Judicial District, County of Alameda, State of California

APPENDIX G.

Certification of Appellate Department to Court of Appeal.

In the Superior Court of the State of California, in and for the County of Alameda, Appellate Department.

The People of the State of California, Plaintiff and Respondent, vs. Paul Chapman, Defendant and Appellant. CR. No. 409.

Filed July 15, 1970.

CERTIFICATION TO COURT OF APPEAL

The Appellate Department of the above-entitled court has affirmed in part and reversed in part an order made by the Municipal Court for the Fremont-Newark-Union City Judicial District denying Defendant's motion to suppress certain evidence under Section 1538.5 of the Penal Code. Said case is hereby transferred and certified to the Court of Appeal of the State of California under Rule 63, California Rules of Court. The Appellate Department makes this certification on its own motion to settle important questions of law.

The above-entitled case involves the constitutionality of the California obscenity statutes (Penal Code 311 and 311.2). It also involves the legality of seizures made of magazines and books under search warrants issued ex parte. This Appellate Department affirmed the order of the Municipal Court as to books and magazines purchased from Defendant and alleged to be obscene, as defined by P. C. 311. This, in effect, holds the California obscenity statutes constitutional. The order was reversed as to the allegedly obscene books and magazines which were seized under a search warrant

issued without prior adversary proceedings. The Court of Appeal in *People v. De Renzy,* 275 A.C.A. 419 (decided in Division One, First Appellate District on August 1, 1969) approved a similar seizure as to moving picture films. However, by way of dicta (Page 423) indicated that its ruling would be different if the seizure involved books offered for public sale. A number of Federal Court decisions on the same subject have invalidated seizures made on ex parte warrants thus creating some conflict between State and Federal Court rulings on the subject.

Dated this ..... day of July, 1970.

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Presiding Judge of the Appellate Dept.

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Judge

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Judge